HJ ELIAS HANAN

v.

HJ MD NOOR SALLEH

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CIVIL SUIT NO: 22-19-1997]
25 JUNE 2002

CONTRACT: *Oral agreement - Construction - Sale of land - Uninterrupted occupation of land for 70 years - Long possession of issue document of title - Whether indicative that land sold to occupier - Admissibility of evidence - Evidence Act 1950, ss. 61, 62, 63, 65, 67-73A - Johore Probate & Administration Enactment 1915, s. 83(3) - Practice Notes No. 3 of 1970 & No. 4 of 1977*

EVIDENCE: *Documentary evidence - Agreed bundle - Truth of content - Whether need not be proved - Whether to be admitted without production of maker or original - Evidence Act 1950, ss. 61-65*

Hj Osman bin Hj Alias in this case, since deceased ('Osman'), was the registered proprietor of a piece of land in Mukim Jalan Bakri, Muar, Johore ('Lot 3206'). In 1925, following Osman's death, Lot 3206 was registered in the name of his administrators. The plaintiff alleged that the administrators of Osman had since sold Lot 3206 to his late father ('Hanan'), and in the circumstances, applied for a declaration to that effect, and for the property to be registered in his name as administrator of the estate of Hanan. In the court, evidence was led by the plaintiff, *inter alia*: (i) that his family had been occupying Lot 3206 continuously for the past 70 years or so; (ii) that the original document of title in respect of Lot 3206 had all along been with him; (iii) that notwithstanding that the purchase price for Lot 3206 had been fully paid, transfer of the property to Hanan had not been effected; and (iv) that in a meeting held on 6 June 1970 between the beneficiaries of the estate of Osman, and as stated in the minutes of meeting thereof ('P3'), the beneficiaries acknowledged that Lot 3206 had been sold to Hanan. The defendant, the present administrator of the estate of Osman, and the registered proprietor of Lot 3206, denied the alleged sale of the property, and in any case argued that the plaintiff had not proved such sale. The issue that arose was whether the property herein had been sold to Hanan by the administrators of Osman.

Held:

[1] In this case, all the parties involved in the sale, namely Hanan and the original administrators of Osman, were long gone and departed. In fact, there is no one living who could, from personal knowledge, assert the issue either affirmatively or negatively. (p 464 g)

[2] The unchallenged testimony of the plaintiff was that Hanan had occupied Lot 3206 since the 1920's or 1930's. The defendant also admitted that he knew that the plaintiff had been occupying the property from the 1970's. These two facts, by themselves, say little to support the plaintiff's case that Lot 3206 had been sold to Hanan. These facts, however, did not stand alone. (p 465 g-h)

[2a] The facts showed that custody of the document of title had been with the plaintiff's family for a long time. This undoubtedly is a fact consistent with ownership. In addition, there were paras. 7 and 9 respectively of P3 which, upon their reasonable construction, alluded to the fact that those at the meeting on 6 June 1970 had: (i) acknowledged that Lot 3206 had been sold to Hanan; (ii) acknowledged that monies towards the purchase had been received; (iii) condescended to the sale; (iv) requested Hanan to consider, if he could, paying something more to the beneficiaries of the estate of Osman. (pp 465 i, 466 h-i & 467 a)

[3] The defendant could not object to the admission of P3, for already included in the agreed bundle was an identical copy of P3, in respect of which both parties had dispensed with formal proof. The law must be that once a document is included in the agreed bundle, it is no longer necessary to prove its existence or execution. And nor is it necessary to produce the original. (p 467 h-i & 468 a-b)

[4] Granted that there was no evidence of the sale price. But long possession of both the land and document of title suggests that the sale price as agreed between Hanan and the administrators of Osman would have been paid in full. Definitely, on the issue called for determination in this case, the preponderance of probabilities is on the side of the plaintiff. There is sufficient evidence for the finding sought by the plaintiff. (p 471 h)

[Application allowed; defendant to execute memorandum of transfer of Lot 3206 in favour of plaintiff.]

Case(s) referred to:

Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy [1996] 3 CLJ 393 ***(refd)***
Aik Ming (M) Sdn Bhd v. Chang Ching Chuen [1995] 3 CLJ 639 CA ***(foll)***
Borneo Co (M) Sdn Bhd v. Penang Port Commission [1975] 2 MLJ 204 ***(refd)***
Chai Phin Chong & Anor v. Zainal Abidin Mohd Salleh & Anor [1998] 4 CLJ 833 HC ***(foll)***
Chik Abdullah v. Itam Saad [1974] 1 MLJ 221 ***(foll)***
Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377 ***(foll)***
Goh Ya Tian v. Tan Song Gou & Ors [1981] 2 MLJ 317 CA ***(foll)***
Helu-Zaid Sdn Bhd v. Sin Heap Lee Brickworks Sdn Bhd [1998] 4 MLJ 733 HC ***(foll)***
Henry Trading Co Ltd v. Harun [1966] 2 MLJ 281 ***(foll)***
Hjh Aminah Bakri v. Manisah Hj Bakri & Ors [1989] 1 CLJ 863; [1989] 2 CLJ (Rep) 950 HC ***(refd)***
Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(foll)***
Khaw Poh Chuan v. Ng Gaik Peng & Ors [1996] 2 CLJ 185 SC ***(refd)***
Koh Siak Poo v. Sayang Plantation Bhd [2002] 1 CLJ 501 CA ***(refd)***
Milroy v. Lord [1861-1873] All ER Rep 783 ***(refd)***
Muthusamy v. PP [1948] 14 MLJ 57 ***(refd)***
PP v. Lo Ah Eng [1965] 1 MLJ 241 ***(refd)***
PP v. Mohd Ali Abang & Ors [1994] 2 MLJ 12 HC ***(refd)***
PP v. Tan Chye Joo & Anor [1989] 2 MLJ 253 ***(refd)***
Tempil Perkakas Sdn Bhd v. Foo Sex Hong [1996] 5 MLJ 542 ***(refd)***
Yap Choo Hoo v. Tahir Yasin & Anor [1970] 2 MLJ 138 ***(not foll)***
Yap Yoke Luan & Ors v. Ong Wee Tok & Ors [1983] 2 CLJ 252; [1983] CLJ (Rep) 433 ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(foll)***

Legislation referred to:

Contracts Act 1950, s. 30
Evidence Act 1950, ss. 61, 62, 63, 64, 65, 67-73A
Johore Probate and Administration Enactment 1915, s. 83(3)
National Land Code, s. 341
Probate and Administration Act 1959, s. 60(4), (6)

Other source(s) referred to:

Halsbury's Laws of England, vol 1, para 10.3.129
Sarkar on Evidence, 15th edn, vol 1, p 1055
Sarkar on Evidence, 15th edn, vol 2, pp 2255-2258

For the plaintiff - Manjit Kaur Nijar (Harjit Singh); M/s Nijar & Nijar
For the defendant - GF Nelson (Hishamudin A Aziz); M/s Hishamudin & Co

Reported by WA Sharif

JUDGMENT

Jeffrey Tan J:

This is an action by the administrator of the estate of Hj. Hanan bin Mogni (deceased) against the administrator *de bonis non* of the estate of Hj. Osman bin Hj. Alias (deceased), *inter alia*, for a declaration that the said Hj. Hanan bin Mogni (deceased) is the owner of land held under EMR 2511 Lot 3206 Mukim Jalan Bakri, Muar (hereinafter referred to as Lot 3206).

According to the statement of claim, (i) the said Hj. Osman bin Hj. Alias (deceased) (hereinafter called Osman) was the registered proprietor of Lot 3206, (ii) the administrators of the estate of Osman, namely Haji Mohamed bin Haji Osman and Hussin bin Haji Osman, had agreed to sell two pieces of lands, namely Lot 3206 and one other lot, to Hj. Hanan bin Mogni (deceased) (hereinafter called Hanan) at the sale and purchase price of RM2,200, (iii) it was agreed that transfer would be effected "apabila pesaka Osman bin Hj Alias di selesaikan", (iv) pursuant to that agreement," Haji Mohamed bin Haji Osman and Hussin bin Haji Osman (hereinafter called the administrators of the estate of Osman) had surrendered the documents of title relating to Lot 3206 and one other lot, to Hanan, (v) the documents of title to those lands are now in the possession of the plaintiff, (vi) on 28 March 1939, Lot 3206 was registered in the names of the administrators of the estate of Osman, (viii) the administrators of the estate of Osman died "sebelum selesai urusan harta pesaka Osman bin Hj. Alias" (ix) Lot 3206 "tidak dapat ditukar milik kepada nama ayah plaintiff", (x) on 30 August 1995, the defendant was appointed administrator *de bonis non* of the estate of Osman, (xi) on 23 April 1960, Hanan and one Haji Abdul Ghani bin Haji Othman, a beneficiary of the estate of Osman, entered into an agreement affirming the oral agreement between the administrators of the estate of Osman and Hanan, (xii) pursuant to the latter agreement, Hanan paid RM1,168 to the said Haji Abdul Ghani bin Haji Othman who agreed that transfer shall be effected "apabila urusan-urusan harta pesaka Haji Osman bin Haji Alias (si mati) di selesaikan", (xiii) throughout, Hanan had paid all quits rents and tapped the rubber trees planted on Lot 3206, (xiv) the three houses erected on Lot 3206 are now occupied by the beneficiaries of the estate of Hanan, who continue to pay all quit rents, (xv) after the death of the administrators of Osman, some beneficiaries of the administrators of Osman received the balance sale proceeds from Hanan, (xvi) transfer of Lot 3206 could not be effected because of the death of the administrators of Osman and because there was no appointment of an administrator *de bonis non*, (xvii) on 21 October 1995, Lot 3206 was registered in the name of the defendant as administrator of the estate of Osman, (xviii) the defendant refused to transfer Lot 3206 to the plaintiff as administrator of the estate of Hanan.

It was admitted in the statement of defence, (i) that since 30 August 1995 the defendant has been the administrator *de bonis non* of the estate of Osman, taking over from the original administrators, namely Haji Mohamed bin Haji Osman and Hussin bin Haji Osman, (ii) that Osman was the registered owner of Lot 3206, (iii) that Lot 3206 is registered in the name of the defendant as administrator, and, (iv) that Haji Abdul Ghani bin Haji Othman is one of the beneficiaries of the estate of Osman. It was denied however that the administrators of Osman had ever agreed to sell the said lots to Hanan, that Lot 3206 was registered on 28 March 1939 in the names of the administrators of Osman, that the administrators of Osman died "sebelum selesai urusan harta pesaka Osman bin Haji Alias", and, that Lot 3206 "tidak dapat ditukar milik kepada nama ayah plaintiff". Otherwise, the defendant averred that the document of title to Lot 3205, if it is in the possession of the plaintiff, is being wrongfully retained by the plaintiff without the knowledge and or consent of the beneficiaries of the estate of Osman or beneficiaries of the administrators of Osman, that he has no knowledge of the alleged agreement between Hanan and Haji Abdul Ghani bin Haji Othman, that the agreement dated 23 April 1960 between Hanan and Haji Abdul Ghani bin Haji Othman was void *ab initio*, that Haji Abdul Ghani bin Haji Othman was not an administrator of the estate of Osman and had no authority to sell the said lots to anyone, and, that Lot 3206 was worked by Hanan without his knowledge or knowledge of the administrators of the estate of Osman. Further, the defendant required proof that the agreement between Hanan and the administrators of the estate of Osman was valid, that Hanan had paid all quits rents and tapped the rubber trees planted on Lot 3206, that the three houses erected on Lot 3206 are now occupied by the beneficiaries of the estate of Hanan, and, that some of the beneficiaries of the administrators of Osman had received the balance sale proceeds from Hanan. Lastly, the defendant denied that he had a duty to transfer Lot 3206 to the plaintiff. On the basis of that defence, the defendant counter-claimed for, (i) an order removing the plaintiff's private caveat Per 42/96 Jilid 55 Fol 94 dated 19 January 1996, (ii) an order that the plaintiff do demolish all buildings erected on Lot 3206 and do deliver up vacant possession of the same to the defendant, and, (iii) damages (prayer (a) of the counter-claim was withdrawn during the trial).

The plaintiff rejoined however, in his reply and defence to counter-claim, that when Lot 3206 was sold to Hanan the document of title to Lot 3206 was surrendered by the administrators of the estate of Osman, that the agreement between Hanan and the administrators of the estate of Osman was valid, that Hanan had occupied and worked on Lot 3206 from the day it was sold to Hanan without any outside interference, and, that Hanan was the rightful owner of Lot 3206 save for formal registration. The plaintiff further contended that

the counter-claim is baseless, frivolous, vexatious and an abuse of the process of court, that Hanan was the rightful owner of Lot 3206, and, that the plaintiff is not a tresspasser.

But when trial commenced, both parties agreed (i) that Lot 3206 was formerly known as SS 3194/25, (ii) that Lot 3206 was first registered in the name of Osman, and then registered on 17 August 1925 in the names of the administrators of Osman, and, (iii) that on 21 October 1996, the defendant was appointed as the administrator *de bonis non* of the estate of Osman. Both parties also agreed that on 15 September 1995 the land office received the defendant's application for the issuance of a duplicate document of title in respect of Lot 3206 upon the stated ground that the original document of title had been lost, that on 26 October 1995 it was gazetted that the original document of title in respect of Lot 3206 had been lost, and, that on 4 April 1996 a duplicate document of title in respect of Lot 3206 was issued to the defendant (see statement of agreed facts in pp. 1 & 2 of encl. 42).

With regard to another piece of land, known as EMR 2510 Lot 3205 Mukim Jalan Bakri, Muar (hereinafter called Lot 3205), both parties agreed, (i) that Lot 3205 was formerly known as SS 2226/25, (ii) that Osman was the original proprietor of Lot 3205, (iii) that Haji Mohamed bin Haji Osman and Hj. Hussein (Hassan) bin Haji Osman "telah didaftar sebagai Pentadbir Kuasa Harta Pesaka Haji Osman pada 21 Syawal 1323" (equivalent to 1902 Gregorian calender), (iv) that on 9 July 1925, Lot 3205 was registered in the names of Haji Mohamed bin Haji Osman and Hj. Hussein (Hassan) bin Haji Osman as beneficial owners, (v) that on 21 October 1980, the 1/2 undivided share of Haji Mohamed bin Haji Osman was vested unto Abdullah bin Hj. Mohammad as administrator of the estate of Hj. Mohammad, (v) that on 20 November 1983, pursuant to an order of court, the 1/2 undivided share of Haji Mohamed bin Haji Osman was transferred to Abdullah bin Hj. Mohammad, (vi) that on 22 October 1984, Abdullah bin Hj. Mohammad transferred his 1/2 undivided share to Dalha @ Mohd Ishak bin A Hanan (1/4), Mat Yusof bin Abdul Hanan (1/8) and Md. Hassan bin Mokhtar (1/8), (vii) that on 21 March 1982, the other 1/2 undivided share belonging to Hj. Hussein (Hassan) bin Haji Osman was "transmitted" to Osman bin Abdul Hamid, and, (viii) that on 21 September 1982, Osman bin Abdul Hamid transferred his 1/2 undivided share to Hanan (see statement of agreed facts in p. 2 of encl. 42).

Further, both learned counsel (Miss Manjit Kaur Nijar for the plaintiff and Mr Hishamudin A. Aziz for the defendant) informed that all documents in bundles marked "AB" (encl. 42), "PB" (encl. 70), and "DB" (encl. 43) are agreed documents with regard to both admissibility and content, except that the contents in Part 2 of encl. 42 are disputed. Both learned counsel also

informed that the claim by the intervenors, who according to the pleadings are the occupiers of the buildings erected on Lot 3206 and who were granted leave by order of court dated 15 July 1999 to intervene (Miss Kaur is also counsel for the intervenors), would be withdrawn in the event of a result favourable to the plaintiff, but would be litigated in the event of a result favourable to the defendant.

The testimony of the plaintiff, the son of Hanan, may be paraphrased as follows. He is the administrator of the estate of Hanan (deceased). Hanan left two pieces of lands – Lot 3206 and Lot 3205. Hanan was the registered owner of a 1/2 undivided share of Lot 3205. His brothers and a nephew are the registered co-proprietors of the other 1/2 undivided share. Lot 3206 was not registered in the name of Hanan. Hanan purchased Lots 3206 and 3205 from the administrators of Osman. Hanan told him that he (Hanan) had paid the full purchase price to the vendors. The purchase was sometime between 1925-1934. Since then, Hanan had possession of Lots 3206 and 3205, and had custody of the original documents of title. Lot 3206 was not transferred to Hanan, as Hanan had no money to pay the costs of the transfer asked by the vendors. Hanan was a rubber tapper. A duplicate title to Lot 3206 was issued to the defendant as administrator, on the ground that the original document of title had been lost. The defendant knew he had the original document of title. The defendant had asked for the original document of title from him. He refused to hand over the original document of title as Hanan had said that he (Hanan) had purchased Lot 3206 and had paid the full purchase price. Through the telephone, he had asked the defendant to transfer Lot 3206 to him as administrator of Hanan. The defendant would not do so. He obtained AB21 from Mohamad bin Abdullah.

Under cross-examination, the plaintiff admitted that his testimony was based on what his father had told him, but the plaintiff denied that his father had purchased lots 3206 and 3205 from Haji Abdul Ghani. The plaintiff maintained that Lot 3206 was not transferred because the costs of transfer was not paid. AB16 and AB17 were payments towards the costs of transfer. The plaintiff agreed that he had no knowledge of the purchase price but disagreed that the full purchase price had not paid, "sebab ayah saya simpan hakmilik". The plaintiff further said that his father was a friend (saudara) of Osman and that at one time his father had worked for Osman. There was no re-examination of the plaintiff.

PW2, the plaintiff's elder brother, similarly testified that his father had informed him that he (Hanan) had purchased lots 3206 and 3205 a long time ago, sometime between the 1920's to 1930's. The beneficiaries of the vendors had asked for additional payments and also for payments towards the costs of

transfer. Hanan entertained most of those requests. But there were requests for money that Hanan would not agree to pay. "AB16 dan AB17 bertimbul sebab ayah membayar tambahan." He witnessed AB17. AB18 and AB19 were also acknowledgements of payments towards the costs of transfer. Lot 3206 was not transferred, even though the purchase price had been settled. There are no buildings on lot 3205. There are three buildings built in the 1970's on lot 3206. PW2 disagreed that AB16-AB20 were acknowledgements of the payment of the balance purchase price. PW2 agreed that he had no knowledge of the purchase price for Lot 3206. But PW2 said that he knew that lots 3206 and 3205 had been purchased and that the full purchase price had been paid. He knew Hj. Abdul Ghani. There was an agreement between Hanan and Hj. Abdul Ghani – "perjanjian ayah dengan Hj. Abdul Ghani ialah bahawa Hj. Abdul Ghani dan lain-lain waris tidak akan datang minta duit lagi." Under re-examination, PW2 said that Hanan had told him that the full purchase price had been paid.

The third witness summoned by the plaintiff was one Osman bin Haji Abdul Hamid (PW3), who said that Osman was his paternal grandfather and that the defendant was the son of his sister. "Hj. Hanan bin Mogni menduduki tanah datuk saya". When shown AB21, PW3 said that he was present at that meeting held on 6 June 1970 to resolve the affairs of the estate of Osman. "Pada 6 June 1970 hal-hal tanah datuk masih belum diselesaikan." PW3 affirmed that the signature on AB22 was his signature. PW3 further said, "Saya yang sahkan apa yang berlaku pada 6 June 1970". An original copy of AB21-22 was produced through PW3 and marked as P3, which is now reproduced below:

MESYUARAT HARTA PUSAKA
DI SUNGAI RAYA BUKIT PASIR, MUAR

Mesyuarat telah pun diadakan di rumah Sdr. Sujak, pada 6hb June 1970, bersamaan 2 haribulan R'Akhir 1390, jam 8.15 malam.

2. Yang hadir:

1. Ma'chik Hitam
2. Busu Hajah Endud
3. Abdullah
4. Halus
5. Osman
6. Mohamed
7. Ismail
8. Hajah Chilah
9. Hajah Saemah
10. Kedok
11. Wiji
12. Kechip
13. Sujak
14. Hakim
15. Ibun
16. Sirus
17. Tahir

a Yang ta'hadir ialah pangkat Po'teh, yang diwakilkan oleh Busu Hajah Endud.

3. Pembukaan telah dibuka oleh Osman, ia mengucapkan berbanyak terima kasih, memuji-muji pada Allah, juga meminta semua hadirin dengan hati yang ikhlas bersedekah Fatihah kepada aruan-aruah yang telah meninggal
b dunia, dan menuntut berbanyak ampun dan ma'af.

4. Ia juga telah menguraikan dengan panjang lebarnya berkenaan tujuan-tujuan yang dimaksudkan pada malam itu, iaitu hal-hal pusaka yang terbiar sekian lamanya, dan dengan tidak secara langsungnya ia juga menjadi pengerusi majlis pada malam itu.

c

5. Pengerusi juga meminta kepada saudara-saudara yang berkenaan (wakil) untuk memberi sepatah dua kata kepada sidang hadirin:

    1. Ma'chik Hitam
    2. Busu Hajah Endud
d 3. Abdullah
    4. Halus
    5. Mohamed
    6. Ismail

e 6. Dengan kata sepakat, dan sebulat suara bagi pihak wakil bersetuju membahagi-bahagikan kepada yang berhak, juga dengan suara Ma'chik Hitam dan Busu Hajah Endud, mengikut cerita ataupun abun dari saudara-saudara yang tua yang telah pun meninggal dunia.

7. Dimulakan dengan:

f 1. Tanah di Jeram sebanyak dua keping grant terbahagi kepada 2 orang:

        1. Keluarga aruah Haji Mohamed
        2. Keluarga aruah Haji Abdul Hamid

g 2. Tanah di Sungai Abong sebanyak 2 keping grant, ta'dapat dibahagi-bahagikan oleh kerana tanah itu telah terjual kepada Tuan Haji Hanan.

3. Tanah di Sungai Raya Bukit Pasir (Darat) sebanyak 2 keping grant terbahagi kepada 5 orang:

h

        1. Keluarga Aruah Kamisah
        2. Keluarga aruah Haji Abdul Ghani

i

3. Ma'chek Hitam

4. Busu Hajah Endud

5. Keluarga aruah Mahat

4. Tanah di Sungai Raya Bukit Pasir (Rumah Besar) sebanyak 1 keping grant terbahagi kepada 5 orang:

1. Keluarga aruah Kamisah

2. Keluarga aruah Haji Abdul Hamid

3. Keluarga aruah Haji Abdul Ghani

4. Ma'chek Hitam

5. Busu Hajah Endud

8. Rumah Besar disetujui dijadikan rumah WAKAF.

9. Perkara Yang Berbangkit:

1. **Tanah Di Sungai Abong**

1. Perbalahan telah berlaku antara satu sama lain dan keputusannya bersetuju tanah itu dijual kepada Tuan Haji Hanan.

2. Duit-duit yang telah diambil oleh aruah, juga kepada Saudara yang lain, disetujui dilupakan saja.

3. Dengan permintaan ahli-ahli mesyuarat, agar Tuan Haji Hanan dapat kiranya menambah pembeliannya.

2. **Kuasa**

1. Kuasa terpulang kepada pengerusi, dan ia berharap dapat sokongan dari yang berkenaan, dengan membelinya secara berperingkat-peringkat,

3. **Pembahagian tanah di Darat**

1. Yang berkenaan telah pun bersetuju, mengikut cara-cara yang telah diabunkan sekian lamanya.

4. **Pembahagian tanah di rumah besar**

1. Dengan permintaan dari pihak perempuan, meminta kepada pihak lelaki, agar kiranya perempuan mendapat di sebelah hadapan.

2. Disetujui bagi pihak wakil dari Osman dan Mohamed.

3. Pembahagian seperti berikut:

Di sebelah kanan rumah besar terdapat kepada Ma'chik Hitam

Di tengah rumah besar terhadap kepada Busu Hajah Endud

Di sebelah kiri rumah besar terdapat kepada keluarga Aruah Kamisah

Di belakang rumah besar antara keluarga aruah Haji Abdul Hamid dan keluarga aruah Haji Abdul Ghani.

5. **Cukai**

1. Bersendirian

10. Lagi sekali bagi pihak pengerusi, meminta kepada semua ahli-ahli mesyuarat, memberi ucapan-ucapan juga kemusykilan-kemusykilan yang terdapat di dalam pemesyuaratan atau bersendirian dan juga lain-lain, kemudiannya tidak ada perkara-perkara besar-besar, hanya pertanyaan yang kecil-kecil saja, yang telah pun dapat dijawab antara satu sama lain.

11. Oleh kerana tidak ada apa-apa yang lain, pengerusi majlis, lagi sekali mengucapkan berbanyak terima kasih, khasnya kepada tuan rumah iaitu Sdr. Sujak dan juga keada Sdr. Ibun yang mana ia telah melancarkan juga memberi nasihat-nasihat dan memberi penerangan kepada wakil-wakil yang tidak berapa faham, amnya kepada hadirin yang mana bersama mengambil bahagian, dan seterusnya kepada kaum keluarga yang tidak bersama-sama pada malam itu, juga lagi sekali menuntut berbanyak ampun dan maaf.

12. Dengan permintaan ramai kepada Sdr. Sujak membacakan doa selamat dan bersurai lebih kurang jam 12 malam.

Yang menjalankan tugas
Osman bin Haji Abdul Hamid

5 salinan tiap-tiap keluarga:

Ma'chik Hitam
Busu Hajah Endud (pangkat Po'teh)
Abdullah
Halus
Osman
Mohamed
Ismail

Pertinently, the first statements of PW3 under cross-examination were, "dalam keterangan tadi saya mengesahkan minit mesyuarat pada 6 June 1970. Apa yang dicatit di perenggan 7.2 di dalam P3 adalah betul". But thereafter, PW3 sang a very different tune. PW3 said that only one piece of land was sold to Hanan. Asked "mengapa satu tanah sahaja di jual", PW3 answered, "Oleh kerana (Lot

3205) diganti dengan wang sebanyak RM2,000 yang diambil oleh keluarga dari pihak penjual. Tanah Lot 3205 sahaja dijual. Tanah yang lagi satu tidak ditentukan harga dan oleh itu tidak dijual". PW3 further testified that there were discussions to sell Lot 3206, but agreement on the price was not reached (ditetapkan), "dan selepas itu tidak dijual sebab tidak ditambah harga". PW3 explained, "Haji Hanan setuju tambah harga, tetapi selepas beberapa rundingan Haji Hanan kata tidak ada cukup duit. Itu sebab saya kata satu sahaja yang telah dijual". When asked "mengapa Hj. Hanan menduduki tanah yang di katakan belum dijual", PW3 explained, "sebab sebelum ini, sebelum di jual oleh Hj. Abdul Ghani, Hj. Hanan telah pun ada duduk di tanah tersebut. Sebelum 6 June 1970 masalah tanah Lot 3206 belum diselesaikan. Dan selepas 6 June 1970 masalah tanah Lot 3206 masih belum diselesaikan. Lot 3206 tidak dijual kepada keluarga plaintif".

With that, it was the turn of the plaintiff to re-examine PW3. But PW3 was not re-examined. Applying instead for leave to impeach the credit of PW3, Miss Kaur contended that PW3 was giving inconsistent evidence – "AB21-22 clearly state, at para. 7.2 and then at (para. 9(1)), that both lands were sold. PW3's testimony is different from AB21-22 ...". That application was not opposed, and leave was granted to the plaintiff to put questions to PW3 which might have been put in cross-examination, as there was a material contradiction serious enough to suggest that PW3 was unreliable (see *Muthusamy v. PP* [1948] 14 MLJ 57) and so ought not to be believed. Paragraph 7.2 of AB21-22 states "Tanah di Sungai Abong sebanyak dua keping grant, ta'dapat di-bagikan oleh kerana tanah telah terjual kepada Tuan Haji Hanan", and para. 9(1)) of AB21-22 states "Tanah di Sungai Abong – (1) Perbalahan telah berlaku antara satu sama lain, dan keputusannya bersetuju tanah ini di jual kepada Tuan Haji Hanan (2) Duit-duit yang telah diambil oleh aruah, juga kepada sdr yang lain, disetujui dilupakan saja, (3) Dengan permintaan ahli mesyuarat, agar Tuan Haji Hanan dapat kiranya menambah pembeliannya". PW3 affirmed that he recorded the minutes of the meeting held on 6 June 1970. PW3 declared, "Apa yang dicatit di perenggan 7.2 di dalam P3 adalah betul". In other words, it was the testimony of PW3 that both lots in Sungai Abong (meaning Lots 3205 and 3206) could not be distributed as both had been sold to Haji Hanan. The later testimony of PW3 was that only one lot (Lot 3205) was sold. Quite clearly, there was a serious contradiction touching at the root of the dispute.

In the impeachment proceedings, PW3 again affirmed that when he put his signature on P3 he attested that two lots were sold "kepada pihak plaintiff". PW3 agreed that he testified "satu tanah sahaja dijual dan harga untuk (lot 3205) belum ditetapkan". But PW3 disagreed that his testimony contradicted the contents of P3. PW3 said, "Tidak ada beza sebab walau dipersetujui dijual,

harga belum ditetapkan ... memang ada perjanjian menjual dua keping tanah tetapi Hj Hanan memberi RM2,000 untuk tanah lot "(3205) tetapi Lot (3206) belum dapat di tentukan harga. Maka ianya belum di jual lagi". Under cross-examination by Mr Hishamuddin, PW3 further said, "saya tahu apa makna percanggahan. (P3) adalah untuk menjelaskan kepada keluarga penjual sahaja". Miss Kaur submitted that the contradiction had not been satisfactorily explained and that the entire testimony of PW3 must be expunged, while Mr Hishamuddin contended that whatever was said was an explanation.

The explanation of PW3 was that the price of Lot 3206 had not been ascertained – "satu tanah sahaja dijual dan harga untuk (lot 3205) belum ditetapkan" ... "Haji Hanan setuju tambah harga, tetapi selepas beberapa rundingan Haji Hanan kata tidak ada cukup duit. Itu sebab saya kata satu sahaja yang telah dijual" ... "memang ada perjanjian menjual dua keping tanah tetapi Hj Hanan memberi RM2,000 untuk tanah lot (3205) tetapi Lot (3206) belum dapat di tentukan harga. Maka ianya belum di jual lagi". But PW3 could not account for his own minutes in P3, stating that "Tanah di Sungai Abong sebanyak dua keping grant, ta'dapat dibahagikan oleh kerana tanah telah terjual kepada Tuan Haji Hanan". There was no explanation from PW3 for the dramatic change in his testimony. First he said, "Apa yang dicatit di perenggan 7.2 di dalam P3 adalah betul". Then he turned against the party calling him, to the extent of repudiating his own minutes of the meeting held on 6 June 1970. Credibility was the issue. But the "explanation" failed to restore any reasonable confidence that PW3 was a truthful witness. In spite of the "explanation", the court was still on the horns of a dilemma, as to which of the two conflicting versions from PW3 should be accepted. The only option was not to give any weight to both versions.

According to *Sarkar on Evidence* 15th edn vol 2 (see pp. 2255-2258), the view that discrediting a hostile witness on certain points amounts to discrediting the witness in toto is no longer true. "The better opinion is that where a party contradicts his own witness on the part of his evidence, he does not thereby throw over all the witness's evidence, though its value may be impaired in the eyes of the court" ... Either party may rely on the evidence of a witness who is cross-examined by the party calling him. There is moreover no rule of law that if a jury thinks that a witness has been discredited on one point, they may not give credit to him on another. The rule of law is that it is for the jury to say. The evidence of such witness is not to be rejected either in whole or in part. It is not also to be rejected so far as it is in favour of the party calling a witness, nor is it to be rejected so far as it is in favour of the opposite party" (see *Sarkar ibid* p. 2257) (see also *PP v. Tan Chye Joo & Anor* [1989] 2 MLJ 253, where it was held by Wan Adnan J, as he then was, that "whether

the testimony of the witness should be rejected in whole or in part depends on the result of the cross-examination, and *PP v. Mohd Ali bin Abang & Ors* [1994] 2 MLJ 12, 20, where it was held by Chong Siew Fai J, as he then was, that it is still incumbent upon the court to scrutinise the whole of the evidence to determine which parts should be disregarded). Except that in the instant case, PW3 was shown to be wholly unreliable, not on some peripheral point, but on the pre-eminent issue. And except that neither party had expressed any desire to rely on any part of PW3's evidence. Rather, the plaintiff had asked for the whole of PW3's evidence to be expunged. That being so, there was no reason therefore not to reject PW3's evidence in toto.

The plaintiff then applied without objection from the defendant to recall plaintiff, to reproduce P3. On recall, the plaintiff testified that he obtained P3 from one Mohd. bin Abdulah, the son of Abdullah bin Haji Abdul Hamid, who died before the commencement of this trial.

The sole witness for the defence was the defendant himself who testified that both lots 3205 and 3206 were originally the property of his great-grandfather. Lot 3205 is registered in the name of the plaintiff. Lot 3206 is registered in his name. He reported the loss of the original document of title and obtained a duplicate title to Lot 3205. He had asked for the original title from the plaintiff who said that it had been lost. Thereafter, he applied for a duplicate title, for estate administration purposes. When he applied for the duplicate title, he did not know if Lots 3205 and 3206 had or had not been sold. He knew that the title to Lot 3205 had been surrendered to the plaintiff. PW3 said that Lot 3206 had not been sold. For that reason, he applied for letters of administration to administer Lot 3206. His mother informed him that Lot 3206 was under the care of the plaintiff's father. He was informed that the plaintiff's father "ada membayar duit kepada datuk saya". He was informed it was a loan. "Saya diberitahu RM2,000 ada dipinjamkan kepada datuk saya." The value of Lot 3206 is about RM1,450,000. He is holding Lot 3206 as trustee for 10 beneficiaries of the estate of Osman. Under cross-examination, the defendant testified that he knew since the 1970's that the plaintiff was occupying Lot 3206. Before him, no one from his side had questioned the plaintiff's right to occupy Lot 3206. In the 1970's, he began to question the right of the plaintiff. In 1995, he was registered as the administrator of Lot 3206. He knew before the commencement of the instant proceedings, that there were separate titles to Lot 3205 and 3206. He knew that the family of the plaintiff was keeping the documents of title from the 1920's or 1930's. AB12 was his statutory declaration. The defendant disagreed, that the reason stated in AB12 for the issuance of a duplicate title was false, that both lots had been sold to the side of the plaintiff because both titles are kept by the plaintiff, and, that the family

of the plaintiff has the possession of both lots because both lots had been sold. The defendant agreed however that he is the only beneficiary of the estate of Osman who "menganggu plaintif". Under re-examination, the defendant said that the administrators of Osman died in the 1930's, and that there were no other administrators before him. He had enquired about the whereabouts of the original document of title from the elder brother of the plaintiff. "Abang plaintif mula kata ada. Lepas itu abang plaintiff kata tidak tahu di mana. Sebab itu saya kata dalam AB4 bahawa geran-geran telah hilang."

After the defendant had closed his case, Miss Kaur again applied to recall the plaintiff, to produce, which he did, the Grant of Letter of Administration (P4) and the death certificate (P5) of Hanan. Mr G.A. Nelson, who was then the lead counsel for the defendant, said he had no objections but qualified that he would want to cross-examine the plaintiff on the assets of the estate of Hanan, which precondition was quickly acceded to by Miss Harjit. Under cross-examination on his 2nd recall, the plaintiff agreed that Lot 3206 was stated in P4 as the beneficial property of Hanan. The plaintiff also agreed that there was an application under the Small Estates Distribution Act for the distribution of the estate of Hanan, but hearing of that application had been adjourned pending this action.

Mr Nelson submitted that the defendant as administrator *de bonis non* is a trustee, and that it is the duty of the defendant to distribute the estate of Osman in accordance with law. The rest of counsel's learned submission may be paraphrased as follows. Both the plaintiff and PW2 do not know the sale price. There was no evidence, direct or indirect, on the alleged sale price. Before he was impeached, PW3 testified that Lot 3206 was not sold. P3 might have been reproduced through the plaintiff, but there was no nexus between them. Plaintiff had no personal knowledge of the business at the meeting. The statements in P3 are all documentary hearsay. P3 could not be admitted through another witness, to circumvent the impeachment. If a witness is impeached, then his product is also impeached (counsel referred to *PP v. Lo Ah Eng* [1965] 1 MLJ 241, 245). There is not an iota of direct evidence of sale by the original owner or by his administrators. All direct parties died a long time ago, and consequently there could not be any evidence of any sale. There is insufficient evidence of a sale. A claimant must discharge the burden of proof, whatever may be the weakness of the defendant's case. The plaintiff who alleged sale must prove that fact. The descendants of Osman might have discussed the matter of Lot 3206, but none of them was competent to bind the estate or sell the subject land (counsel referred to *Khaw Poh Chuan v. Ng Gaik Peng & Ors* [1996] 2 CLJ 185). The alleged sale was by administrators, who must obtain leave to sell. Otherwise, such sale would be voidable (counsel referred

to sub-ss. 60(4) and 60(6) of the Probate and Administration Act 1959). There was no leave to sell. The only persons authorised to deal with the subject were the administrators. The alleged sale was not by the administrators or administrators *de bonis non*. The sale cannot bind the estate. Even in the 1930's, s. 83 of the Johore Probate & Administration Enactment 1915 provided that an administrator may not transfer without permission of court. Under the current provisions, leave is a *sine qua non* (counsel refered to *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; [1983] CLJ (Rep) 433, and to *Hjh Aminah bte Bakri v. Manisah bte Haji Bakri & Ors* [1989] 1 CLJ 863; [1989] 2 CLJ (Rep) 950). The plaintiff had not proved the consideration. The plaintiff and PW2 said they do not know the price. A contract without consideration is void (counsel referred to *Abdul Rahim bin Syed Mohd. v. Ramakrishnan Kandasamy* [1996] 3 CLJ 393, and to s. 30 of the Contracts Act). Under the rule in *Milroy v. Lord* [1861-1873] All ER Rep Reprint 783, equity will not perfect an imperfect obligation. The doctrine of long possession has no application (counsel referred to s. 341 of the National Land Code). The purported transaction could not be upheld. The counterclaim should be allowed.

Touching first on the pleadings of the plaintiff, Miss Kaur conceded that no evidence was led to prove para. 7 (the pleading on the oral agreement between Hanan and Haji Abdul Ghani bin Haji Othman, a beneficiary of the estate of Osman, affirming the oral agreement between the administrators of the estate of Osman and Hanan) of the statement of claim. Touching next on the pleadings in general, Miss Kaur contended that non-pleaded issues had been raised by Mr Nelson. Parties are bound by their pleadings, she said (counsel referred to *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330). There was no pleading from the defendant on the validity or legality of the oral agreement, the capacity of the administrators, or on the absence of formal consent for sale. Non-pleaded issues should not be heard (counsel referred to *Aik Ming (M) Sdn. Bhd. v. Chang Ching Chuen* [1995] 3 CLJ 639). There was no cross-examination on those non-pleaded issues. To hear non-pleaded issues would lead to a miscarriage of justice. A comparable case is *Chik binti Abdullah v. Itam binti Saad* [1974] 1 MLJ 221, where the Federal Court held that since it was not pleaded it was too late to raise the argument that the agreement had been entered into by the defendant in her personal capacity. The plaintiff's father was the equitable owner only to be clothed with legal title. The main issue is whether the subject property was purchased by the plaintiff's father. The transaction occurred at a time when all parties were not even born. None of the contracting parties are still alive. Lot 3205 which is now registered in the name of the beneficiaries of Hanan was originally the property of Osman. Lot 3206 was continuously occupied by the family of the plaintiff for the past 70 odd years. There was quiet and uninterrupted

possession. The original documents of title are with the plaintiff. There were no eviction proceedings against the plaintiff. Those facts are consistent with ownership. The defendant testified that he asked for the title from the plaintiff. Therefore, the defendant knew that the plaintiff had custody of the document of title to Lot 3206. According to P3, both Lots 3205 and 3206 had been sold to the plaintiff's father. P3 was physically produced by Mr Hishamudin who said that the authenticity of P3 was not challenged. P3 could not be objected to, as formal proof of P3, which is also found in AB21, had been dispensed with. P3 must be genuine. Going by the pleadings, the only issue is whether there was a sale. AB16-20 support the finding of a sale. Otherwise, what was the reason for those payments. On the balance of probabilities, the plaintiff had proved his case. No evidence was led on the counter-claim, which therefore ought to be dismissed.

Mr Nelson replied that it was pleaded in para. 9 of the defence that the validity of the oral agreement between Osman and Hanan was disputed. Given the averments in para. 4(a) of the statement of claim, the plaintiff was aware of the legal formality involved in a transaction of land belonging to an estate. All direct parties are dead. That which has been adduced – the oral allegations – is mere hearsay. The plaintiff could not state the sale price. So how could sale be said to have been proved. Price must be proved. Mr Nelson reiterated that at the material time, the disposition was subject to s. 83(3) of the Johore Probate & Administration Enactment 1915. There was no evidence of leave of court, even if the administrators had agreed to sell.

Miss Kaur responded, and to which end she also reprised some of her arguments, that s. 83(3) of the Johore Probate & Administration Enactment 1915, even if it applied, was not pleaded, that the plaintiff is not relying on adverse possession, and that the issue is whether there was a sale.

"In too much dispute, truth is lost." But one fact could not be lost, and it is the fact that all alleged parties involved in the sale (Hanan and the administrators of Osman) are long gone and departed. In fact, there is no one living who could assert either the affirmative or negative of the issue, from personal knowledge. Both the plaintiff and defendant have no personal knowledge of the issue, as the alleged transaction was before their time. Indeed, both the plaintiff and defendant admitted that they were only informed, in the case of the plaintiff by Hanan that he (Hanan) had purchased Lots 3205 and 3206 from the administrators of Osman, and in the case of the defendant by PW3 that Lot 3206 had not been sold to Hanan. But of course, what the plaintiff and defendant said that was told to them, being hearsay, is not any proof, of the affirmative or negative of the issue. And the case of the plaintiff,

who is the pursuer, is definitely not helped by the fact that there is no document or other instrument of sale between Hanan and the administrators of Osman. That is not to say however that there is no proof of the affirmative or negative of the issue. From admissions and oral testimony, there is proof of the following facts and circumstances. The sole question is what to make of it.

To begin with, it is an admitted fact that both Lots 3205 and 3206, the property of Osman, were registered in the names of the administrators of Osman in 1925. In so far as Lot 3206 is concerned, the next registered proprietor after the administrators of Osman is the defendant who testified "pada 1995 saya didaftarkan sebagai pentadbir tanah".

The history of Lot 3205 is more convoluted. According to the agreed facts, Lot 3205 was registered in the name of the administrators of Osman on 21 Syawal 1323 (equivalent to 1902 Gregorian calender) and then in the names of Haji Mohamed bin Haji Osman and Hj. Hussein (Hassan) bin Haji Osman as beneficial owners on 9 July 1925. Thereafter, on 21 October 1980, the 1/2 undivided share of Haji Mohamed bin Haji Osman was vested unto Abdullah bin Hj. Mohammad as administrator of the estate of Hj. Mohammad. Then on 20 November 1983, pursuant to an order of court, the 1/2 undivided share of Haji Mohamed bin Haji Osman was transferred to Abdullah bin Hj. Mohammad who on 22 October 1984 then transferred his 1/2 undivided share to Dalha @ Mohd Ishak bin A Hanan (1/4), Mat Yusof bin Abdul Hanan (1/8) and Md. Hassan bin Mokhtar (1/8). The other 1/2 undivided share belonging to Hj. Hussein (Hassan) bin Haji Osman was "transmitted", on 21 March 1982, to Osman bin Abdul Hamid who then transferred, on 21 September 1982, his 1/2 undivided share to Hanan. Evidently, the plaintiff was not wrong when he said in his testimony that Lot 3205, the onetime property of Osman, is registered, half in the name of Hanan and half in the names of his brothers and nephew.

There is also proof that the family of the plaintiff had occupied Lots 3205 and 3206 for many, many years. The unchallenged testimony of the plaintiff was that Hanan had occupied both Lots from the 1920's or 1930's. The defendant admitted that from the 1970's he knew that the plaintiff was occupying Lot 3206. Given so, it must be taken as an established fact that Hanan had occupied Lot 3206 for a very long time, long before the institution of this proceeding.

By themselves, those two latter facts say little to support the plaintiff's case that both lots had been sold to Hanan. But those two latter facts stand not alone. Custody of the documents of title had been with the plaintiff's family for a very long time, an undoubted fact consistent with ownership. In addition, there is para. 7.2 of P3 ("tanah di Sungai Abon sebanyak dua keping grant,

ta'dapat di-bagikan oleh kerana tanah telah terjual kepada Tuan Haji Hanan") which clearly states that the lands in Sungai Abong (which are the two lots) had been sold to Hanan and so could not be distributed. That para. 7.2 of P3 was clear acknowledgment, even way back in 1970, that both lots had been sold to Hanan. Admittedly, para. 9.1 of P3 ("tanah di Sungai Abong – (1) Perbalahan telah berlaku antara satu sama lain, dan keputusannya bersetuju tanah ini di jual kepada Tuan Haji Hanan ...") could be read that it was decided at that meeting on 6 June 1970 to sell both lots to Hanan. But para. 9.1 should not be read in isolation. And in the context of P3 as a whole, para. 9.1 could not be read to mean that it was decided at that meeting on 6 June 1970 to sell both lots to Hanan. The following para. 9.2 ("duit-duit yang telah diambil oleh arwah, juga kepada sdr yang lain, disetujui dilupakan saja") was admission even in 1970 that monies towards both lots were received by those gone and departed and by those at the meeting. And surely, the receipt of monies towards those two lots is consistent with the alleged fact of sale. That there was a sale is further substantiated by para. 9.3 ("dengan permintaan ahli-ahli mesyuarat, agar Tuan Haji Hanan dapat kira-nya menambah pembelian"), which was the minute of a request by those at the meeting to Hanan, to consider, if he could, to increase his payment towards his purchase. And surely that minute is inconsistent with any construction that it was decided at that meeting on 6 June 1970 to sell both lots to Hanan, for if that was the case, then there would not have been that para. 7.2 or that request to Hanan, to consider, if he could, to increase his payment towards the purchase. If that was the case, then para. 9.3 should have been a formal demand of the price demanded by those at the meeting rather than in the form of a supplication. Read literally, the minutes of P3 say that both lots had been sold to Hanan and so could not be distributed (para. 7.2), that those at that meeting on 6 June 1970 agreed to the sale of both lots to Hanan (para. 9.1), that monies received by those gone and departed and by those at the meeting on account of both lots are to be "forgotten" (para. 9.2), and that there was a request by those at the meeting on 6 June 1970 to Hanan, to consider, if he could, to increase his payment towards his purchase. But as said, para. 9.1 is inconsistent with the rest of P3. Paragraph 7.2 in particular and paras. 9.2 and 9.3 to a lesser extent, all indicate that those at the meeting on 6 June 1970 all acknowledged that both lots had been sold to Hanan. The overall picture of P3 is that both lots had been sold. It was acknowledged that both lots had been sold and so could not be distributed, and given that acknowledgement in para. 7.2 which preceded para. 9, it could not have been decided thereafter at that meeting on 6 June 1970 to sell both lots to Hanan. To make sense of it all, the reasonable construction of paras. 7 and 9 in the context of P3 as a whole has to be that those at the meeting on 6 June 1970 (i) acknowledged that both lots had been sold to Hanan, (ii) acknowledged that monies towards the purchase had been received by "arwah,

juga kepada sdr yang lain", (iii) condescended to the sale, (iv) abandoned the matter of monies received by those gone and departed and by those at the meeting, and, (v) requested Hanan to consider, if he could, to pay something further to the beneficiaries of the estate of Osman.

In any event, whether that meeting of 6 June 1970 had or had not agreed to the sale of those two lots to Hanan is not in issue. The issue that arose from the plaintiff's pleading that the administrators of the estate of Osman had sold both lots to Hanan and the defendant's denial that there was any such sale by the administrators of Osman, is whether there was a sale of the lots by the administrators of Osman to Hanan. And the contents of P3 say that at some point prior to the meeting on 6 June 1970, that there was a sale of those lots to Hanan.

It was contended that the plaintiff had no personal knowledge of the business at the meeting on 6 June 1970, that the statements in P3 are documentary hearsay, and that P3 could not be admitted through the plaintiff to circumvent the impeachment of PW3.

It was held by Abdul Kadir Sulaiman J, as he then was, in *Tempil Perkakas Sdn Bhd v. Foo Sex Hong (t/a Agrodrive Engineering)* [1996] 5 MLJ 542, 547, that "it is clear law that if anything is said or tendered through a witness which is not within the actual knowledge of the witness, anything said or tendered would remain inadmissible notwithstanding the omission to object by the opposing party". In the instant case, P3 was re-tendered through the plaintiff, who obviously had no personal knowledge of the business transacted at the meeting on 6 June 1970, without any objection from the defendant (see p. 24 of the notes). Mr Nelson submitted that on the authority of *PP v. Lo Ah Eng* [1965] 1 MLJ 241, 245 that when a witness is impeached, his product is also impeached. Indeed, in *PP v. Lo Ah Eng*, Harley J held that "the previous statement is like an Indian rubber – it does not produce written testimony, but merely erases the evidence given in the witness box". At first blush, it would appear that P3 which was re-tendered through the plaintiff who had no personal knowledge of the business transacted in P3 was inadmissible, nothwithstanding the omission by the defendant to object to its admission. But the plaintiff had some personal knowledge of P3. There was a nexus between the plaintiff and P3. The plaintiff testified that he obtained P3 from one Mohd. bin Abdulah, the son of Abdullah bin Haji Abdul Hamid. And the plaintiff was entitled to produce the thing he said he had obtained. P3 was admitted in evidence on that basis. Anyway, for all intents, the defendant could not object to the admission of P3, for already included in the agreed bundle was an identical copy of P3 (see AB21-22) to which both parties had dispensed with formal proof. Given that an identical copy had been formally admitted, the admission

of the original document could not reasonably be resisted. To object to the admission of P3 would be tantamount to resile from the mutual agreement to dispense with all formal proof of AB21-22. Moreover, "the law must be that once a document is included in an agreed bundle, it is no longer necessary to prove their existence or execution. Nor is it necessary to produce the original. But so far as the contents of the documents are concerned, the truth of the same has still to be proved, in the absence of any specific admission of the facts therein contained" (*Chong Khee Sang v. Pang Ah Ghee* [1984] 1 MLJ 377, 382, per Shankar J, as he then was). It was not as if with admission of P3 in evidence, that the truth of the contents in P3 which were not admitted by the defendant was thereby proved. Nothing was changed by the admission of P3 in evidence.

On the matter of proof of the contents of a document, s. 61 of the Evidence Act 1950 (EA) provides that "the contents of document may be proved either by primary or by secondary evidence. Section 62 of the EA provides that "primary evidence means the documents itself produced for the inspection of the court". Section 63 of the EA provides that "secondary evidence includes (a) certified copies given under the provisions (of the EA); (b) copies made from the original by mechanical processes ... and copies compared with such copies; (c) copies made from or compared with the original; (d) counterparts of documents as against the parties who did not execute them; (e) "oral accounts of the contents of a documents given by some person who has himself seen or heard it or perceived it by whatever means. Section 64 of the EA further provides that "documents must be proved by primary evidence" except in the cases provided in s. 65. And s. 65 of the EA states:

> (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
>
> (a) where the original is shown or appears to be in the possession or power:
>
> (i) of the person against whom the document is sought to be proved;
>
> (ii) of any person out of reach of or not subject to the process of the court; or
>
> (ii) of any person legally bound to produce it,
>
> and when after the notice mentioned in section 66 such person does not produce it;
>
> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any reason not arising from his own default or neglect produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Malaysia to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2)(a) In the cases referred to in subsection (1)(a), (c) and (d) any secondary evidence of the contents of the document is admissible.

(b) In the case referred to in subsection (1)(b), the written admission is admissible.

(c) In the case referred to in subsection (1)(e) or (f) a certified copy of the document but no other kind of secondary evidence is admissible.

(d) In the case referred to in subsection (1)(g), evidence may be given as to the general result of the documents by any person who has examined them and is skilled in the examination of such documents.

Therefore, written law provides that the contents of a document as opposed to the truth of the contents are proved by the production of the document itself, or by the production of a copy as defined in s. 63 and admitted under s. 65. Sections 67-73A govern cases both of primary and secondary evidence. "(Therefore) when a document is produced as primary or secondary" evidence, it will have to be proved in the manner laid down in ss. 67-73(A)" (see *Sarkar on Evidence*, 15th edn, vol 1, p. 1055). But it was no longer necessary in the instant case to prove AB21-22 in the manner laid down in ss. 67-73A. As said, AB21-22 was included in the agreed bundle comprising documents the authenticity of which was not challenged and formal proof of which was dispensed by the parties. Paragraph 2 of Practice Note No 3 of 1970 (fully restored by Practice Note No 4 of 1977) which applies to all claims, clearly states that the proof of any document in the agreed bundle, "by formal production of the original or a copy thereof (of by) any witness tendering it or producing it in court is unnecessary ... The object of thus obtaining admissions is to preclude the necessity of formally proving documents or facts admitted ...". And that has always been the law. The first of the reported

authorities on the subject of agreed bundles was *Henry Trading Co. Ltd v. Harun* [1966] 2 MLJ 281, where the Federal Court per Wan Sulaiman J, as he then was, enunciated "that where there is an agreed bundle of documents there is no need to prove these documents". And the Federal Court added, "this rule is too well established to be doubted". Further authorities holding the same were (i) *Goh Ya Tian v. Tan Song Gou & Ors* [1981] 2 MLJ 317, 319, where is was held by Lai Kew Chai J, as he then was, "that the documents in the agreed bundle are admitted into evidence by consent without production of the maker or originals and the contents do form part of the evidence before the court", (ii) *Chai Phin Chong & Anor v. Zainal Abidin Mohd. Salleh & Anor* [1998] 4 CLJ 833, 836, where it was held by Ian Chin J that "it is law that where a document is agreed to be included in an agreed bundle without any reservation the maker need not be called", (iii) *Helu-Zaid Sdn Bhd v. Sin Heap Lee Brickworks Sdn Bhd* [1998] 4 MLJ 733, and, (iv) *Jaafar Shaari & Anor v. Tan Lip Eng & Anor* [1997] 4 CLJ 509, 521, where the Federal Court per Peh Swee Chin FCJ enunciated as follows:

> It goes without saying that either or any of the parties to any particular civil case can effectively object to the inclusion of any document in an agreed bundle of documents, and further, he is at liberty to impose conditions upon which any particular documents is included therein, if he agrees in the first place to such inclusion.
>
> In the absence of any express conditions regarding the inclusion of any of the documents in the agreed bundle of documents speaking for myself, I have always taken the agreed bundle in a civil case to mean as follows without meeting any contradiction or any serious contradiction from any member of the Bar or any appellate court in my decades at the Bar or on the Bench.
>
> First and foremost, the agreed bundle of documents means that the documents are authentic and they do exist, therefore they require no proof of their authenticity by calling, eg their makers.
>
> Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either parties.
>
> Thirdly, such documents therein do not form automatically a part of the evidence of the case in question *ipso facto*, but any such documents does become part of the evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

> Fourthly, at the end of the whole case, the truth of the contents of any of the documents is up to the court to determine, regard having had, *inter alia*, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, eg either great or no weight to be given to any part of any document is also a matter for the trial court, which consider the documents including any 'written hearsay' contained therein. The court may refuse to give any weight at all to any document, but then it is accountable like in all matters, to the parties and to the appellate court for reasons for such refusal.
>
> (for the distinction between the contents as opposed to the truth of the contents of a document formally admitted, see also *Mohd Nazari Ab Majit v. Tan Keo Hock & Anor* [1999] 1 CLJ 601, 605).

The view expressed in *Yap Choo Hoo v. Tahir bin Yasin & Anor* [1970] 2 MLJ 138 that a witness must formally tender documents already in the agreed bundle, is definitely not the law. In the instant case, both parties had dispensed with formal proof of AB21-22, and the contents of AB21-22 were proved with the production of AB21-22 (or P3) in the agreed bundle. Therefore, the production of P3 added nothing to what had already been proved by the production of AB21-22. As said, nothing was changed by the admission of P3 in evidence.

Likewise, the contents of AB16-20 were proved by the mere production of those documents. And the contents of AB16-20 entirely support the alleged fact of sale as well as the testimony of PW2 who witnessed AB17 that the beneficiaries of the vendors had asked for additional payments and other payments towards the costs of transfer. In so far as truth of the contents of AB21-22 is concerned which must be judged in the light of other evidence and circumstances, that Lot 3205 which was the property of Osman is registered in the names of the members of the plaintiff's family, that the plaintiff's family has custody of the original documents of titles, that the plaintiff's family has been occupying Lots 3205 and 3206 for many years, are all factors consistent with the truth of the contents of para. 7.2. Conversely, such factors as would be inconsistent with the truth of para. 7.2 are conspicuously absent. Even the testimony of the defendant that his mother had informed him that Lot 3206 was under the care of the plaintiff's father suggest that Hanan must have had some right over Lot 3206. Granted, there was no evidence of the sale price. But long possession of both the land and document of title suggest that the safe price agreed between Hanan and the administrators of Osman would have been paid in full. Definitely on the issue called for determination in this case, the preponderance of probabilities is on the side of the plaintiff. There is sufficent evidence for the finding sought by the plaintiff.

Mr Nelson submitted that the alleged sale required formal sanction, and that it being without the same was null and void. There was disagreement as to whether that latter issue was pleaded by the defendant. But there should be all round agreement, because the law is settled, that parties are bound by their pleadings. And there lies the importance of pleadings. There are countless authorities on the function of pleadings, but a short and authoritative commentary of what is the law can be found in *Halsbury's Laws of England*, vol. 1, para. 10.3.129, which reads as follows:

> The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Thus a party is bound by his pleadings and his case is confined to the issues raised in the pleadings unless and until they are amended. A plaintiff who at the trial radically departs from his case as pleaded, however, is likely to fail. It follows that the pleadings enable the parties to decide in advance of the trial which evidence will be needed. From the pleadings the appropriate method of trial can be determined. They also form a record which will be available if the issues are sought to be litigated again. The matters in issue are determined by the state of pleadings at their close.

The law presents no difficulty at all. The difficulty is with the practical aspect, for pleadings are often far less than perfect, which imperfection is often the cause for debate as to whether an issue is on the record. That difficulty could be seen in the case of *Koh Siak Poo v. Sayang Plantation Bhd* [2002] 1 CLJ 501, where on the one hand it was held by the majority that the necessary facts to sustain a cause of action for money had and received had been sufficiently pleaded in the statement of claim, and where on the other hand it was held by the minority that the issue of unjust enrichment was never pleaded by the plaintiff. Still, "... no one case is an authority for another. Each case must be decided on its particular facts" (*Borneo Co. (M) Sdn. Bhd. v. Penang Port Commission* [1975] 2 MLJ 204, per Lee Hun Hoe CJ). In the case of the instant pleadings, the alleged sale was first brought up in para. 4(a) of the statement of claim, which reads:

> Haji Mohamed Bin Haji Osman (simati) dan Hussin Bin Haji Osman (simati) sebagai Pentadbir Harta Pesaka Haji Osman Bin Hj. Alias (simati) telah berjanji untuk menjualkan dua (2) keping tanah kepunyaan Haji Osman Bin H. Alias termasuk tanah tersebut (EMR 2511 Lot 3206 Mukim Jalan Bakri, Muar) kepada ayah Plaintiff, iaitu Haji Hanan Bin Mogni untuk harga sebanyak RM2,200.00. Adalah juga di persetujui iaitu tanah tersebut akan di tukar miliknya apabila urusan harta pesaka Osman Bin Haji Alias (simati) di selesaikan. Suratan Hakmilik Asal tanah pesaka telah diserahkan kepada Haji

Hanan Bin Mogni oleh Haji Mohamed Bin Haji Osman (simati) dan Hussin Bin Haji Osman (simati) semasa mereka masih hidup lagi mengikut perjanjian jualbeli secara lisan dan pada masa kini berada di dalam milikan Plaintif.

The pleaded response of the defendant to that para. 4(a) of the statement of claim, was para. 4 of the defence, which reads:

Selain daripada mengakui pengataan tuntutan Plaintiff bahawa Haji Mohamed Bin Haji Osman (simati) dan Hussin Bin Haji Osman (simati) sebagai Pentadbir Harta Pesaka Haji Osman Bin Haji Alias (simati) di dalam perenggan 4(a) Penyataan Tuntutan Plaintiff, Defendan menafikan keseluruhan pengataan tuntutan Plaintif di dalam perenggan yang sama dan meletakkan beban pembuktian yang kukuh ke atas Plaintiff.

Defendan selanjutnya menyatakan bahawa Suratan Hakmilik Asal bagi Lot 3205, Mukim Jalan Bakri, Muar, Johor yang dikatakan di dalam simpanan Plaintiff adalah dimiliki secara tidak sah dan tanpa pengetahuan dan kebenaran Defendan dan waris-waris Haji Osman Bin Haji Alias (simati) termasuk Haji Mohamad Bin Haji Osman (simati) dan Hussin Bin Haji Osman (simati).

The plaintiff pleaded but the defendant denied that there was a sale. Those pleadings raised the question of the sale. The issue for adjudication is whether there was a sale.

Next, the plaintiff pleaded that the administrators of Osman died "sebelum selesai urusan harta pesaka Osman bin Hj. Alias ... lot 3206 tidak dapat di tukar milik kepada ayah plaintiff" (para. 5 of the S/C), to which the defendant responded with a denial and a demand for strict proof (para. 6 of the defence). Plainly, those pleadings raised "no question on the validity of the alleged sale between Hanan and the adminstrators of Osman. Indeed, all other pleadings raised no question on the validity of the alleged sale between Hanan and the administrators, save for the last paragraph of para. 9 of the defence, which reads:

Defendan selanjutnya menyatakan bahawa sekiranya Plaintif ingin membuktikan keesahan perjanjian bertulis tersebut (meaning the alleged agreement between Hanan and Haji Abdul Ghani Bin Haji Osman) yang mana dinafikan oleh Defendan, Plaintif hendaklah membuktikan terdahulu keesahan perjanjian lisan di antara Haji Hanan Bin Mogni (simati) dengan Haji Mohamad Bin Haji Osman (simati) dan Hussin Bin Haji Osman (simati) yang mana juga di nafikan oleh Defendan.

The rejoinder of the plaintiff was the following:

Berkenaan dengan perenggan 9 Pernyataan Tuntutan Defendan, Plaintif mengatakan perjanjian jual beli tanah di antara ayahnya dan Haji Mohamad Bin Haji Osman and Hussin Bin Haji Osman adalah perjanjian yang sah dan perjanjian di antara Abdul Ghani Bin Haji Osman (simati) dan ayah Plaintif Haji Hanan Bin Mogni (simati) bertujuan untuk mengesahkah perjanjian jual beli lisan di antara Haji Hanan Bin Mogni dan Haji Mohamad Bin Haji Osman dan Hussin Bin Haji Osman.

In that last paragraph of para. 9 of defence, the defendant clearly gave notice, that the defendant required the plaintiff to first prove the validity of the agreement between Hanan and the administrators of Osman "sekiranya plaintif ingin membuktikan keesahan perjanjian bertulis (antara Hanan dan Haji Abdul Ghani bin Haji Osman)". In other words, the defendant required the plaintiff to first prove the validity of the agreement between Hanan and the administrators of Osman, should the plaintiff proceed to prove the validity of the agreement between Hanan and Haji Abdul Ghani bin Haji Osman. It also means, that the plaintiff was not required to prove the validity of the agreement between Hanan and the administrators of Osman, should the plaintiff not proceed to prove the validity of the agreement between Hanan and Haji Abdul Ghani bin Haji Osman. Now whether that para. 9 of the defence was so interpreted by the plaintiff was not said and so could only be guessed at. But no evidence was adduced by the plaintiff towards proof of the agreement between Hanan and Haji Abdul Ghani bin Haji Osman. So it should follow that the plaintiff was not required to prove the validity of the agreement between Hanan and the administrators of Osman.

In any event, there was no notice in the pleadings that the capacity of the administrators of Osman to contract, and the absence of formal consent would be issues. There was also no notice in whatever form or manner during the trial, that those issues would be raised, for no evidence was led and no cross-examination was pursued by either parties on those issues, which would not have been the case if the pleadings had set out those issues. All evidence only addressed the issue of sale, which say that the issues on the capacity to contract and the absence of formal consent for sale would not therefore have been in the contemplation of the parties during the trial. Not pleaded, it was too late to raise those issues at the stage of oral submissions (*Chik binti Abdullah v. Itam binti Saad (supra)* – followed).

For the reasons herein, it is hereby declared that Hj. Hanan bin Mogni (deceased) was the owner of land held under EMR 2511 Lot 3206 Mukim Jalan Bakri, Muar; to perfect the title of Hanan, it is hereby ordered that the defendant do execute a good and registrable memorandum of transfer of Lot 3206 in favour of the plaintiff as administrator of the estate of Hanan and

deliver the said duly executed memorandum of transfer together with the document of title to the plaintiff within 30 days from the date of this order, failing which, it is hereby ordered that the learned senior assistant registrar do execute the said memorandum of transfer on behalf of the defendant and that the Pentadbir Tanah Muar do cancel document of title known as GM 903 Lot 3206 Mukim of Jalan Bakri, Muar and restore document of title known as EMR 2511 Lot 3206 Mukim of Jalan Bakri, Muar. The counter-claim is dismissed with costs. Lastly, it is ordered that the defendant as administrator of the estate of Osman, do pay the legal costs of the plaintiff.